

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/44/2020

19th November 2020

Order

In the matter of Mr. Kamal Garg, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/6 dated 27th August, 2020 issued to Mr. Kamal Garg, B 1223, Shastri Nagar, New Delhi-110052 who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00533/2017-2018/10958.

Background

- 1.1 The IBBI had issued on 27th August, 2020, the SCN to Mr. Kamal Garg for accepting the assignment of the voluntary liquidation of UAS International Trip Support Private Limited (CD) after 31st December 2019 without holding a valid Authorisation for Assignment (AFA) from his IPA. The public announcement was made on 12th January 2020.
- 1.2 Mr. Garg submitted reply to the SCN on 27th & 31st August, 2020. The IBBI referred the SCN, response of Mr. Garg to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. A personal hearing was scheduled on 9th September, 2020, however, the IP did not avail the opportunity of personal hearing before the DC.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(a) & (e) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(a) & (h) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment of the voluntary liquidation of UAS International Trip Support Private Limited after 31st December, 2019 for which public announcement was made on 12th January, 2020 without holding a valid AFA from the IPA.

Written and oral submissions by Mr. Kamal Garg

3. Mr. Garg's submissions made in his written reply are summarized as follows.
 - (i) As per the Board Resolution dated 16th December 2019, the assignment for voluntary liquidation was accepted by him prior to 31st December 2019. As per regulation 7A of IP Regulations it is clearly mentioned that provisions of the regulation shall not apply to an assignment which an insolvency professional is undertaking as on 31st December 2019.
 - (ii) The acceptance and appointment are two different things, merely a subsequent approval by shareholders at a later date cannot be construed that the assignment was accepted from shareholders' approval date.
 - (iii) Acceptance signifies 'consent' of the IP/Liquidator for the assignment under proposal and the preliminary work with respect to the same also commenced from that very date itself.
 - (iv) The spirit of regulation 7A of the IP Regulations and the cut off applicability date is based upon the spirit of the 'offer', 'acceptance', 'appointment', 'execution', 'conclusion' of /for the assignment.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN of Mr. Garg and also the provisions of the Code, rules and the regulations made thereunder finds as follows.
 - 4.1 The DC notes that the Regulation 7A of IP regulations requires every IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

*“7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:
Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-
(a) 31st December, 2019; or
(b) the date of expiry of his authorisation for assignment.”*
 - 4.2 Thus, it is clear from the said Regulation that one of the essential condition for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake any assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations vide notification dated 23rd July 2019.
 - 4.3 The bye-laws of Indian Institute of Insolvency Professionals of ICAI defines in para 4(1)(aa) the expression “authorisation for assignment” as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made by the IPs to the IPA under para 12A of said bye-laws. An IP who is more than 70 years of age is ineligible to make an application for AFA under para 12A (2)(e) of the said bye-laws.

4.4 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

*“208. Functions and obligations of insolvency professionals.-
(2) Every insolvency professional shall abide by the following code of conduct: –
(a) to take reasonable care and diligence while performing his duties;
(b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and
(e) to perform his functions in such manner and subject to such conditions as may be specified.”*

4.5 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses(a) and (h) of regulation 7 (2) of the IP Regulations provide as follows:

*“7. Certificate of registration.
(2) The registration shall be subject to the conditions that the insolvency professional shall –
(a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;
(h) abide by the Code of Conduct specified in the First Schedule to these Regulations;”*

4.6 Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with malafide or with negligence.

4.7 Section 59(5) of the Code read with regulation 3(3) of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Voluntary Liquidation Regulations) provides that the liquidation proceeding shall be deemed to have commenced from the date of passing of Board Resolution. Further, regulation 5(2) of Voluntary Liquidation Regulations provides that the Board Resolution shall contain the terms and conditions of appointment of liquidator.

5. In the present matter, the DC notes that the Board of Directors of the CD passed a special resolution for voluntary liquidation on 16th December 2019 and also approved

the appointment of Mr. Garg as liquidator in the voluntary liquidation process of the CD. His remuneration as well as other details are also stated in the said special resolution. Thus, the special resolution has been passed before 31st December 2019. As per regulation 3(3) of the Voluntary Liquidation Regulations, the liquidation proceeding in this matter has commenced on the date of passing of the special resolution, *i.e.*, 16th December 2019, prior to the requirement of AFA for accepting or undertaking assignment under Regulation 7A of the IP Regulations which came into effect from 1st January 2020, *i.e.*, after 31st December 2019. Therefore, the DC finds that Mr. Garg undertook the assignment on 16th December 2019, *i.e.*, prior to 31st December 2019. The matter falls within the ambit of the proviso to regulation 7A of the IP Regulations, hence, regulation 7A is not applicable in the instant matter and the DC does not find any lapse on the part of Mr. Kamal Garg.

Order

6. In view of the above, the DC in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Kamal Garg.
- 6.1 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Kamal Garg is enrolled as a member.
- 6.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
7. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Date: 19th November 2020
Place: New Delhi